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Supreme Court, U.S.
FILED
JUL 28 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

CORNELIUS H. EDGE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable, The Chief Justice Of The United States And The Justices Of The Supreme Court Of The United States:

The petitioner, Cornelius Edge, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the judgment entered against him on June 3, 1971.

A. The opinion below

On June 1, 1971, the petitioner's appeal to the United States Court of Appeals for the Seventh Circuit was af-

firmed and a copy of the Opinion is annexed hereto and marked as Appendix A. The Opinion is not yet reported.

B. Jurisdiction

The jurisdiction of this court is invoked under Rule 19 of the Supreme Court Rules and 28 U. S. Code 1254 (1) on the ground that review by the Supreme Court by Writ of Certiorari is sought of a judgment of the affirmation on appeal by the United States Court of Appeals for the Seventh Circuit.

C. Questions Presented

1. Does the Fourth Amendment preclude a search of an automobile in the custody of narcotic agents for upwards of three hours where the search was not incident to the arrest and where the searching agents had no search warrant for the vehicle?

2. Does this court's decision in *Coolidge* v. *New Hampshire,* 91 S.Ct. 2022, decided on June 21, 1971, overrule the Court of Appeals' decision, decided on June 3, 1971?[1]

3. May a citizen be arrested under the authority of an arrest warrant which does not charge any specific crime violation?

4. May an arrest warrant be issued upon a complaint wholly deficient by the tests set out in *Spinelli* v. *United States,* 393 U.S. 410 (1969) and *Aguilar* v. *Texas,* 378 U.S. 108 (1964)?

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[1] Although Petition for Rehearing in the Court of Appeals was filed on June 28, 1971, regrettably, the *Coolidge* opinion was not called to the attention of the Court of Appeals. Petition for Rehearing was denied on July 8, 1971.

5. Is it "harmless error" for the jury to learn a gun was found in the home of defendant when the charge was possession of a small quantity of heroin found in a car miles from the scene of the home? And is it proper for a jury to learn of defendant's arrest on some supposed "narcotic violation" never prosecuted?

6. In a prosecution charging possession of heroin knowing the same to have been illegally imported in violation of 21 U. S. Code 174, does a charge to the jury which leaves the jurors with the impression that they should infer that defendant had knowledge of unlawful importation from the fact of his possession improperly destroy the government's burden of proving defendant guilty beyond a reasonable doubt? And where the instructions were in conflict with the decisions of two other Circuits (Second Circuit, *United States* v. *Peeples*, 377 F.2d 205 (1967) and the Ninth Circuit, *United States* v. *Christion*, 426 F.2d 787 (1970)), ought not this Court grant the Writ to resolve the conflict between the Circuits?

D. Statement of the case

Petitioner was charged in a three-count indictment with possessing heroin (Count 1) and cocaine (Count 2), knowing the same to have been illegally imported in violation of 21 U. S. Code 174, and possessing marijuana (Count 3), in violation of 21 U. S. Code 176 (a).

Hearings were held on petitioner's motion to suppress evidence (A. 1-10);[2] the motion was denied. (A. 10) A jury convicted petitioner on all three counts, and the court sentenced him to a term of 10 years on each count, and a

[2] "A." refers to printed Appendix filed in the Court below.

fine of $1,000, his sentences to run concurrent, but the fines, consecutive. (A. 42)

In its Opinion of June 3, 1971, the Court of Appeals reversed the conviction on Count Two (involving cocaine) under the authority of *Turner* v. *United States,* 396 U.S. 398, 418 (1970) and reversed the conviction on Count Three (involving marijuana) under the authority of *Leary* v. *United States,* 395 U.S. 6, 52 (1969). However, the conviction as to Count One, involving heroin, was affirmed.

Statement of facts

A warrant for the arrest of petitioner was issued on March 28, 1968 predicated upon the verified complaint of a narcotic agent, which complaint was based on information supplied to agent Pringle:

> " . . . by Agent Robert Janet, who was told by a reliable informant who has furnished reliable information on previous occasions to him and the Bureau of Narcotics that during the months of June, 1967, and January, 1968, he accompanied another individual to the home of Edge at 7359 S. Prairie, Chicago, approximately twice each month, and on each occasion this other person would enter the home of Edge, and purchase heroin, which he then showed and gave informant. Also, this person told the informant that his 'connect' and source of supply was Cornelius Edge." (A. 1).

Upon the hearings on the motion to suppress, the trial court indicated there was no showing on the face of the complaint that the person who told the reliable informant about what happened inside Edge's house, was himself reliable. (A. 1). The following colloquy occurred between the prosecutor, Mr. Weber, and the court (A. 1-2):

> "Mr. Weber: That is correct, there is not any indication on the face of this that he was or that he wasn't,

about the person that is going in there, but we do have these people together at least twelve times for the six months, going to the same house, which is known to be Cornelius Edge's house and each time he comes out with some heroin.

The Court: We do have that, but I am not impressed with your defense of the last sentence.

Mr. Weber: Well, if we have to stick to the basis of this then, of course, there isn't anything in here which says that this person who went in there is reliable. I don't know if we need something.

The Court: Well, why do you have to say in the first part of your complaint and further set forth some support that he was reliable, if this is of no consequence? That is in there because the law requires it."

A search warrant also was issued for the search of petitioner's house, based on a complaint in support of the search warrant. (A. 2-5)

Petitioner was arrested at about 8 p.m. on March 28, 1968 by agents who curbed his car at 72nd and Green Streets, Chicago, Illinois, removed him from the car, searched him, handcuffed his hands behind his back, and, after putting him in agent Pringle's car, searched petitioner's automobile. (A. 6-7)

While petitioner was yet in handcuffs, he was driven in an agent's car to his home at 7359 S. Prairie Ave., Chicago, some blocks distant from the place of arrest on the street. Petitioner's wife Gladys was in the house when the agents brought petitioner into it. A small quantity of cocaine was found under a rug; and a gun was found in the house. Petitioner's wife, Gladys Edge, was also arrested and charged with possession of cocaine. (A. 8) After the search of the house and the placing of Mrs. Gladys Edge under arrest, agents left the house at about 10:30 p.m. and drove

petitioner and his wife to the Federal Building in downtown Chicago some miles away from the scene of petitioner's initial arrest and seizure of his car. (A. 19). Petitioner's car was driven to the Federal Building by narcotic agents.

An agent testified, over defense objections on the grounds there was no search warrant for the car and that the search occurred several hours after petitioner's arrest (A. 16), that he found a small quantity of heroin between the glove box and a portion of the dash panel (A. 16) when they searched the car in the garage around 11 or 11:15 p.m. (A. 20)

Reasons for Granting the Writ

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1. The search of the car which produced a tiny quantity of heroin was made when the car had been secured by agents for upwards of 3 hours; and the car was searched at a place some miles distant from where petitioner was arrested in it.

The circumstances of the search of the car which produced the small quantity of heroin were not "incident to the arrest", the arrest having taken place on the south side of Chicago at about 8 p.m. on March 28, 1968. (A. 10) The car was searched incident to the arrest while on the street and a small quantity of marijuana was found. Petitioner never got back into his car. Agents drove the car to a garage beneath the Federal Building in downtown Chicago, at about 11 or 11:15 p.m., when agents conducted another search of the car. (A. 20). The agents had no warrant for the search of the car.

In this posture then, the recent decision in *Coolidge* v. *New Hampshire,* 91 S.Ct. 2022 (decided June 21, 1971) is controlling. This court stated, under somewhat similar circumstances, p. 2033:

> "Even assuming, *arguendo,* that the police might have searched the Pontiac in the driveway when they arrested Coolidge in the house, Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777, makes plain that they could not legally seize the car, remove it, and search it at their leisure without a warrant. In circumstances virtually identical to those here, Mr. Justice Black's opinion for a unanimous Court held that '[o]nce an accused is under arrest and in custody, then a search [of his car] made at another place, without a warrant, is simply not incident to the

arrest.' Id., at 367, 84 S.Ct. at 883. Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed.2d 538. Cf. Chambers v. Maroney, 399 U.S. 42, 47, 90 S.Ct. 1975, 1979, 26 L.Ed.2d 419. Search incident doctrine, in short, has no applicability to this case.''

Accordingly, certiorari should be granted to determine the application of *Coolidge* upon the facts of this case.

2. The arrest warrant issued by the Commissioner on the basis of the invalid complaint was a mere pretext to arrest and search.

No prosecution ensued for any crime as a result of the arrest of petitioner upon the execution of the arrest warrant, as such; probably for the good reason that the warrant of arrest did not charge any specific crime.

The court pointed out that the arrest warrant itself, issued on March 28, 1968, indicated that an application was made for an arrest warrant based on some conduct by the petitioner in January 1968. (A. 6) The prosecutor argued that the Commissioner issuing the arrest warrant must have concluded that the petitioner ''had violated the law in January (1968).'' (A. 6). But there were no specifics in the arrest warrant by which petitioner could know for what crime he was charged.

The arrest warrant was used merely as a pretext to search the person of the petitioner and to search the car he was driving. As such, the arrest was in violation of the Fourth Amendment.

3. The verified complaint in support of the arrest warrant was legally deficient in not passing the "two-pronged test" of Spinelli-Aguilar.

In *Aguilar* v. *Texas,* 378 U.S. 108, this court struck down a warrant which recited that the ''affiants have received reliable information from a credible person and do believe

that heroin, marijuana, barbiturates and other narcotics . . . are being kept at the above described premises . . . " 378 U.S. 109. In reversing, Your Honors stated, "The magistrate must be informed of . . . some of the underlying circumstances *from which the officer concluded that the informant . . . was 'credible' or his information 'reliable'*. 378 U.S. at 114.

In the case at bar, even the trial judge questioned the sufficiency of the complaint, after which the prosecutor shifted ground and suggested the government need not have relied upon the arrest warrant. The trial court stated there was no showing on the face of the complaint (heretofore set out) that the person who told the reliable informant about what happened inside Edge's house, was himself reliable. (A. 1) The prosecutor admitted there was nothing in the complaint respecting the reliability of the so-called original informant. (A. 2) The prosecutor then noted to the court that the arrest warrant was "superfluous" (A. 5), and relied "on the statutory powers which were given to the agents by the Congress." (A. 6). Title 26, U. S. Code, Sec. 7607 permits narcotic agents to "make arrests without warrant for violations of any law of the United States relating to narcotic drugs . . . where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation." But that statute cannot overreach or undermine the "probable cause" requirement of the Fourth Amendment which states:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation . . . "

The statute can go no further than the Fourth Amendment in permitting warrantless arrests without probable cause. *Draper* v. *United States*, 385 U.S. 307, 310 (1959); *Wong Sun* v. *United States*, 371 U.S. 471, 478, note 6 (1963).

If the arrest was illegal, the search of petitioner's car was likewise improper, and what was discovered should have been suppressed.

4. Petitioner's rights under the Fifth and Sixth Amendments were violated when evidence of his arrest "for a narcotic violation" and evidence of the discovery of a gun in his home were presented to the jury.

Although details of the arrest were necessary for the trial court's consideration in determining petitioner's motion to suppress the evidence, those details and the reasons therefor, were not material to the issues of guilt or innocence before the jury. At trial, the arresting agent testified that at the moment of arrest he told petitioner, "I am a federal agent. You are under arrest for the violation of federal narcotic laws. Step outside the car." This was met with petitioner's objection, motion to strike and motion for mistrial, all of which were denied. (A. 21).

When an agent was being interrogated as to what his search of petitioner's house revealed, he stated he had not found anything himself; but when the prosecutor asked if he saw something, he said, "I saw a weapon." (A. 11). Petitioner's motion for a mistrial was denied (A. 11), although the court instructed the jury "to disregard the statement about that." (A. 11).

The jurors should not have heard any of this obviously prejudicial evidence. The evidence of "other crimes" was not so inextricably bound with the case-in-chief that the evidence was a necessary adjunct to the proof of the alle-

gations charged in the indictment. *Michaelson* v. *United States,* 335 U.S. 469, 476 (1948), decided that evidence of a bad general record over-persuades the jury of a defendant's criminal propensity, thereby denying him a fair opportunity to defend against a criminal charge.

Rules should be announced to decide the outer limits of the intrusion of prejudicial evidence in narcotic cases. The onus of narcotic-violation accusation itself is bad enough.

5. The jury was improperly instructed in derogation of rights guaranteed under the Fifth Amendment.

The court instructed the jury as follows:

> "Now, the three essential elements required to be proved in order to establish the offense charged in Count I of the indictment, which is the heroin Count, is, first: The act or acts of receiving, buying, selling, concealing, transporting or in any manner facilitating the concealment, transportation, or sale of a narcotic drug, heroin, as alleged; which narcotic drug had been imported into the United States contrary to law, as charged; and, secondly, doing such act or acts knowingly, and unlawfully, and, third, knowledge of the accused that the narcotic drug had been imported into the United States contrary to law, as charged." (A. 39).
>
> * * *
>
> "You are instructed that before you can find the defendant guilty you must find from the evidence beyond a reasonable doubt that the defendant and nobody else was in exclusive possession of the substance under consideration here. If you find from the facts and circumstances in this case that another person or persons could have had possession of said substance, then you are directed to return a verdict of not guilty." (A. 40).

* * *

The Court said the following portion of Section 174 applied to the first two counts:

> "Whenever on trial for a violation of this statute . . . the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." (A. 41).

The Court restated that defendant has presumption of innocence and no burden to produce evidence; then:

> " . . . if, as to Count I, you should find from the evidence beyond a reasonable doubt that the defendant had possession of the narcotic drug, heroin, as charged, the fact of such possession alone, unless explained to your satisfaction, permits you to draw the inference and find that the narcotic drug, heroin, was imported contrary to law, and to draw the further inference and find that the defendant had knowledge that the narcotic drug was imported contrary to law." (A. 41).
>
> * * *
>
> "In connection with any explanation the defendant may choose to offer for possession of a narcotic drug, or marijuana, you are reminded that in the exercise of constitutional rights the accused need not testify. *However, possession may be explained through other circumstances and other evidence, independent of the testimony of the accused.*" (A. 42; Emphasis added.)

The Court of Appeals held that " . . . the instructions as applied to heroin were not open to the criticism made . . . " Opinion (Appendix "A", p. App. 1).

But the holding by the Seventh Circuit is in conflict with the decision by the Second Circuit in *United States* v. *Peeples,* 377 F.2d 206 (1967) and with the holding of the Ninth Circuit in *United States* v. *Christion,* 426 F.2d 787 (1970). As *Peeples* stated, pp. 209-210:

> "There was serious and prejudicial error in the instructions given by the court below. The initial charge,

quoted supra, is deficient in its failure to advise the jury that, despite the operation of the statutory presumption, Peeples would not have violated the statute by his having had *unlawful* possession of the heroin if he had no knowledge of its unlawful importation. Within the meaning of Section 174, an accused need not show 'lawful' possession to merit a 'not guilty' verdict; if believed by the jury, evidence disclaiming his knowledge of unlawful importation is sufficient. Chavez v. United States, 343 F.2d 85, 89-90 (9 Cir. 1965); Griego v. United States, 298 F.2d 845, 848 (10 Cir. 1962); United States v. Turner, 65 F.2d 587, 588 (2 Cir. 1933); see also Harris v. United States, 359 U.S. 19, 23, 79 S.Ct. 560, 3 L.Ed.2d 597 (1959). *To require that a defendant must establish that his possession of a narcotic is a lawful possession would authorize convictions to be obtained solely on proof of possession of contraband narcotics.* Therefore, to the extent that there are cases in this circuit that may seem to have a different approach to this issue we distinguish them, *and cases from other circuits as well.*" (Emphasis added).

The Second Circuit disagrees specifically with the Seventh Circuit, citing the Seventh Circuit's case, *United States* v. *Kapsalis,* 313 F.2d 875, 877-878 with which it disagreed. (See *Peeples,* p. 210, note 4).

To resolve the conflict between the Circuits, the Writ should be granted.

Conclusion

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: July 27, 1971

APPENDIX

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1970 — JANUARY SESSION, 1971

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 17395 vs.

CORNELIUS H. EDGE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 3, 1971

Before SWYGERT, *Chief Judge,* FAIRCHILD, *Circuit Judge,* and GORDON, *District Judge.*[1]

FAIRCHILD, *Circuit Judge.* Cornelius Edge appeals from conviction and sentence on three counts, charging him with transactions in specified drugs, with knowledge of unlawful importation. In each instance the conviction rests upon

[1] The Honorable Myron L. Gordon, Judge of the U. S. District Court for the Eastern District of Wisconsin, is sitting by designation.

the inference drawn from unexplained possession that the drug was illegally imported and that the possessor knew that fact. Count II (21 U.S.C. § 174) involved cocaine and the government concedes the conviction must be reversed under *Turner* v. *United States* (1970), 396 U.S. 398, 418. Count III involved marihuana (21 U.S.C. § 176a), and the same concession is made under *Leary* v. *United States* (1969), 395 U.S. 6, 52. Count I, however, involved heroin (21 U.S.C. § 174), and conviction may properly rest on inferences of guilt drawn from proof of possession alone. *Turner*, p. 407.

The principal issue on appeal is the validity of the search in which the heroin was found.

1. *The second search of Edge's car.*

On March 28, 1968, narcotics agents obtained warrants for the arrest of Edge and for the search of his home. That night, about 8 p.m., agents followed his car, curbed it, and placed him under arrest. After removing Edge from the car, the agents conducted a five minute search and discovered a small brown paper bag containing what they then believed and later determined to be marihuana. This became the subject of Count III.

One agent seized the car. Others took Edge to his home, which they searched pursuant to the search warrant. They discovered a small aluminum foil package containing a white powder which proved to be cocaine. It became the subject of Count II.

Agents took Edge from his home to the federal court house, whither his car had been brought. With Edge present, and under the garage lights, agents made a more thorough search of the car. Between the glove box and a portion of the dash panel, the agents discovered an

aluminum foil package which contained heroin. It was the subject of Count I.

The validity of the second search of the car is the critical issue. One of the subsidiary questions is whether the arrest was valid.

The two warrants were issued at the same time, and the commissioner had both a complaint and an affidavit for search warrant before him. Both may be considered in determining the adequacy of the showing of probable cause.[2]

The complaint was sworn to by agent Pringle. It set forth that it was based on information supplied to Pringle "by Agent Robert Janet, who was told by a reliable informant who has furnished reliable information on previous occasions to him and the Bureau of Narcotics that during the months of June, 1967, through January, 1968, he accompanied another individual to the home of Edge at 7359 S. Prairie, Chicago, approximately twice each month, and on each occasion this other person would enter the home of Edge, and purchase heroin, which he then showed and gave informant. Also, this person told the informant that his 'connect' and source of supply was Cornelius Edge."

Critical to the reliability of the information that Edge repeatedly sold heroin is the credibility of the informant. Even though the informant did not observe the transactions between Edge and the unidentified individual, the circumstances the informant related, including the repeated trips to Edge's home and the informant's observing and receiving heroin from the individual, make it reasonable for the commissioner to believe that the individual was truthful

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[2] *In re Rosenwasser Bros., Inc.* (1918), (E.D.N.Y.), 254 F. 171, 173.

in naming Edge, if the commissioner was given a basis for deciding that it was reasonable to believe the informant.[3] The underlying circumstance from which agent Janet, and in turn the affiant, concluded that the informant was credible was that he had "furnished reliable information on previous occasions." The only possible criticism of that statement as sufficient reason to believe the informant is its generality.[4]

But if a proper reading of *Aguilar* requires more particularity, we think that other information set forth in the affidavit for the search warrant supported a reasonable belief that Edge was making sales of heroin, as well as other narcotics, at and from his home.

The affidavit, also by agent Pringle, set forth six items of information, one of which substantially duplicates the material in the complaint.

In one item, the affiant related observations made by agents the evening of March 18. Pringle and another agent saw Edge come from his home and enter his car. A short time later a woman came out of the home, walked to the car, and handed Edge a package. She reentered the home. A short time later Edge honked his horn. She came out and handed him another package. Edge drove a circuitous route to the Jazz Keller Lounge. Agent Gibson observed him meet another man. Edge remained ten minutes and drove off.

In another item, affiant related that on March 19 at 11 p.m., Edge drove from his home to the Lounge and agent

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[3] See *Aguilar* v. *Texas* (1964), 378 U.S. 108, 114.

[4] See *United States* v. *Roth* (7th Cir., 1967), 391 F2d 507, where, in addition to the fact that the statement was general, there was nothing to show the manner in which the informant had gained his information.

Rhodes observed him meet with a man believed to be Keller. Rhodes heard Keller tell a man and a woman, "He does not have anything to sell, but will give you some." The four went to a private room. Rhodes later observed the man, woman, and Edge acting in a manner described, which caused Rhodes to believe they were under the influence of narcotics. The next night Edge again drove from his home to the Lounge, and Rhodes observed Edge and another in conduct which led him to believe a narcotics deal occurred.

Another item set forth Edge's record of arrests for narcotics charges, one conviction, and two searches of his home which yielded marihuana and cocaine.

In another item, affiant said that in February Rhodes had purchased heroin from a narcotics peddler, Matthews, and Matthews told Rhodes his source was Edge.

Another item was to the effect that in September, 1967, an informant "who had furnished reliable information on previous occasions" said that Edge was a part of a particular "Organization," dealt in cocaine, marihuana, and heroin, and kept all these in his home and in his auto.

Although these other items of information did not relate directly to the transactions between Edge and the individual related in the complaint, they tended, when considered together, to show a pattern and course of conduct, and to support the probability that he had made unlawful sales as charged. We conclude that the warrant was sufficiently supported, and that the arrest was valid.

The only attack on the first search of the car is based on the claim that the warrant and arrest were invalid. The events occurred before the decision of *Chimel* v. *California* (1969), 395 U.S. 752.

The second search of the car is attacked on the grounds that it was remote in time and place from the arrest. The car had been seized, however, when marihuana was found in it. Although the government ultimately failed to prove that the marihuana had been unlawfully imported and that Edge knew of that fact, the agents had probable cause to believe at the time that it was contraband and its transportation unlawful.[5] If so, the car was subject to forfeiture under 49 U.S.C. §§ 782, 783. A search of a car an interval after it was seized for similar cause under a state statute was held not unreasonable where the subsequent search "was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained."[6]

It should also be noted that if the information possessed by the agents gave them probable cause to search the car, it was not unreasonable to make a more thorough search, without a warrant, after moving the car to obtain the advantage of good light.[7]

We conclude that the second search was not unreasonable under the circumstances.

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[5] 49 U.S.C. § 781.

[6] *Cooper* v. *California* (1967), 386 U.S. 58, 61. See *Lockett* v. *United States* (9th Cir., 1968), 390 F2d 168, 172, cert. den. 393 U.S. 877; *Drummond* v. *United States* (8th Cir., 1965), 350 F2d 983, 988, cert. den. sub. nom. *Castaldi* v. *United States*, 384 U.S. 944.

[7] *Chambers* v. *Maroney* (1970), 399 U.S. 42, 52; See *United States* v. *Evans* (7th Cir., 1967), 385 F2d 824.

2. *Request for production of informant.*

At the suppression hearing, the district court denied a request for production of the informant.

There is no constitutional nor federal evidentiary rule that a defendant, in attacking the existence of probable cause for an arrest or search, has a right to learn the identity of an informant.[8]

Appellant relies here on minor variations between the complaint and affidavit for search warrant, both made by Agent Pringle. We do not find that these discrepancies cast doubt on the veracity of the agent or the existence of an actual informant.

3. *Claim of prejudicial circumstances.*

Almost inevitably, in the course of proof of the three offenses charged, based on the drugs found the night of the arrest, references to the warrants and various other background circumstances came into the record. Appellant contends that these matters were prejudicial and suggests that the prosecutor sought to produce a prejudicial effect. Our examination of the record does not persuade us that references to background facts unfavorable to Edge were undue or avoidable.

4. *Challenge to instructions.*

Appellant sets forth in his brief portions of those instructions dealing with the subject of permissible infer-

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[8] *McCray* v. *Illinois* (1967), 386 U.S. 300, 311-312. For discussions of the difficulties inherent in deciding when and how far to permit attack upon the truthfulness of affidavits submitted to magistrates, see A.L.I. Model Code of Pre-Arraignment Procedure, T. D. No. 3, pp. 107-115; *United States* v. *Halsey* (S.D.N.Y., 1966), 257 F.Supp. 1002, 1005; Note, Testing the Factual Basis for a Search Warrant, 67 Columbia L. Rev. 1520 (1967).

ences, from unexplained possession, of unlawful importation and knowledge thereof. He contends that the result was to approve as to these elements "a less substantial standard than the requirement of proof beyond a reasonable doubt." He omits from his quotations the court's admonition that the sections of the statute "do not change the fundamental rule that a defendant is presumed innocent unless proven guilty beyond all reasonable doubt. Nor does it impose upon a defendant the burden of producing proof that the narcotic drug was lawfully imported, or any other evidence. As previously stated, the burden is always upon the prosecution to prove guilt beyond all reasonable doubt." We think the instructions as applied to heroin were not open to the criticism made, although they were, as now conceded, erroneous as to the cocaine and marihuana.

Insofar as the judgment finds defendant guilty as charged in Counts II and III and imposes sentences therefor, it is reversed. Insofar as it finds him guilty as charged in Count I and imposes sentences therefor, it is affirmed.
A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Thursday, July 8, 1971

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 17395 vs.

CORNELIUS H. EDGE,

Defendant-Appellant.

IT IS ORDERED by the Court that the petition for rehearing filed in the above-entitled cause be, and the same is hereby denied.